2000

Brixen & Christopher Architects, P.C. a Utah Professional Corporation v. State of Utah : Brief of Appellee

Utah Court of Appeals

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R. Wayne Klein; assistant attorney general; Jan Graham; attorney general; counsel for respondent and appellant.

IN THE UTAH COURT OF APPEALS

BRIXEN & CHRISTOPHER ARCHITECTS, P.C. a Utah Professional Corporation,	:	
Petitioner and Appellee,	:	
vs.	:	
STATE OF UTAH,	:	Case No. 20000318-CA
Respondent and Appellant.	:	Priority No. 15

BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

Brixen & Christopher Architects, P.C. concurs with the State that jurisdiction is proper pursuant to Utah Code Ann. §78-2a-3(2)(j) (1996) and that this is an appeal from the decision of Judge Lewis of the district court dismissing a civil investigative demand ("CID") issued by the Attorney General to Brixen & Christopher.

ISSUE PRESENTED

Was the material presented to the district court (i.e. the affidavit of L. Del Mortensen), taken as a whole, sufficient objective evidence to establish reasonable cause to believe there has been an antitrust violation or that Brixen & Christopher Architects, P.C. was in possession of information pertaining thereto?

STANDARD OF REVIEW

Brixen & Christopher concurs with the standard of review as set out by the State. The appellate court "will review the district court's decision for correctness while affording a 'measure of discretion' to that court in [its] application of the correctness standard to a given set of facts." *Evans v. State*, 963 P.2d 177, 197 (Utah 1998) (citing *State v. Hodson*, 907 P.2d 1155, 1157 (Utah 1995); *State v. Pena*, 869 P.2d 932, 939 (Utah 1994); *State v. Poole*, 871 P.2d 531, 533 (Utah 1994)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Appellee does not believe that there are any constitutional provisions, statutes, ordinances, rules, and regulations which are determinative of the appeal or of central importance to the appeal, other than as found in Addendum A to Appellant's Brief.

STATEMENT OF FACTS/STATEMENT OF THE CASE

Brixen & Christopher Architects, P.C. is a well-respected local architectural firm. In January, 2000 the State served a Civil Investigative Demand against Brixen & Christopher, in which it declared that Brixen & Christopher is a "target" of an antitrust investigation, seeking information from Brixen & Christopher which, if furnished, may be used "in a civil or criminal proceeding against you . . ." The CID states that the activities under investigation are:

> A combination or conspiracy in restraint of trade in the creation of door hardware specifications for public buildings and in the sale of door hardware for installation in public buildings in Utah.

Brixen & Christopher has not engaged in any such combination or conspiracy, and the State has not put forward any facts to give rise to a reasonable cause to believe that it or any other architect has or that it was in possession of information pertaining thereto.

SUMMARY OF ARGUMENT

Brixen & Christopher Architects, P. C. ("Brixen") accepts the proposition, as enunciated by the Attorney General, that she must establish that she has "reasonable

cause" to believe that there is a violation of the anti-trust laws and that the recipient of the civil investigative demand has knowledge concerning the violation.

The trial court did not impose additional requirements to the statute as contended by the Attorney General in her brief. She simply explored what constitutes "reasonable cause" under the statute as interpreted by *State v. Evans,* 963 P.2d 177 (Utah 1998), and found the "evidence" wanting.

Contrary to the contention of the Attorney General that "substantial evidence" was presented to the trial court showing "agreements between a manufacturer and architects to create restrictive bid specifications that foreclosed competitors and raised prices to public entities" (brief, p. 6), the Affidavit of Mortensen, the State's sole evidence before the court, established no such agreements nor that the activities claimed constitute an antitrust violation. Rather, it speculated that such agreements might exist, but gave no detail such as was the case in *Evans* in which the affidavit contained substantial detail.

ARGUMENT

As required by statute, UCA §76-10-917, the State included in its CID a statement of the nature of the activities under investigation, constituting the alleged antitrust violation, which may result in a violation of the act and the applicable provision of law. The State alleged a combination or conspiracy in restraint of trade in the creation of door hardware specifications for public buildings.

When Brixen & Christopher challenged the CID, the State presented an Affidavit of its investigator, L. Del Mortenson. Mr. Mortenson's affidavit is attached hereto as Addendum A. Mr. Mortenson's Affidavit is the only evidence presented by the State in support of its CID. It does not contain objective, factual evidence alleging a combination or conspiracy in restraint of trade.

An antitrust plaintiff must prove three elements: an agreement among two or more persons or distinct business entities, which is intended to harm or unreasonably restrain competition, and which actually causes injury to competition. *National Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987) certiorari dismissed *Los Angeles Memorial Coliseum Comm'n v. National Basketball Ass'n*, 484 U.S. 960, 108 S.Ct. 362, 98 L.Ed.2d 386.

Utah Code Ann. § 76-10-914(1), under which the State claims it is investigating, is essentially identical to Section 1 of the Sherman Antitrust Act. *American Airlines v. Christensen*, 967 F.2d 410 (10th Cir. 1992). The Utah legislature intends that the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts with comparable state antitrust statutes. Utah Code Ann. § 76-10-926.

Mr. Mortenson's affidavit does not contain any objective evidence of a conspiracy or restraint of trade. In addition, Mr. Mortenson's affidavit makes key, but incorrect, assumptions.

A. The Affidavit does not contain objective facts giving rise to reasonable cause to believe that a conspiracy in restraint of trade, as required by antitrust law, exists.

An essential element of a claim under the Sherman Act based on an agreement imposing an unreasonable restraint on trade is proof of an unlawful objective. *Willman v. Heartland Hosp. East*, 34 F.3d 605, certiorari denied, 514 U.S. 1018, 115 S.Ct. 1361, 131 L.Ed.2d 218 (8th Cir. 1994). To prove that an agreement to restrain trade exists between two or more persons, a plaintiff must demonstrate a unity of purpose or a common design and understanding, or a meeting of minds, in an unlawful arrangement. *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, (11th Cir. 1998) reh'g denied, 172 F.3d 884 (11th Cir. 1999).

On page 13 of its Brief, the State identifies what it believes to be the restraint of trade in this case: "In the instant case, the architects submitted specifications (foreclosing the use of competitors' products) to public entities in exchange for free bid-drafting services provided to the architects by the manufacturer." The Mortensen affidavit does not support the State's assertion. But assuming, *arguendo*, that it does, the sentence does not allege a restraint of trade. There is no agreement alleged that the architect will use the specification prepared by the manufacturer. There is no unity of purpose alleged between the manufacturer and the architect. There is no allegation that the architect, having accepted the free specifications drafted, has any obligation with respect to the manufacturer. Mortensen's affidavit does not allege a single fact to

support its key assumption that any architect submitted specifications in exchange for free bid-drafting services.

Use of bid-drafting services does not violate any antitrust laws. It is merely a service, a form of salesmanship, and as such is pro-competitive. If other manufacturers of door hardware want to provide the same service, the antitrust laws do not prevent them from doing so. The State argues that architects performing work on state buildings are contractually prohibited from using "sales" or "agent" consultants. If so, and if the State believes that "sales" or "agent" consultants are being used, it is free to bring a breach of contract action against any party in violation. Breach of contract, however, does not rise to the level of an antitrust violation, and does not support the issuance of a CID which may only be issued in connection with an antitrust investigation. Utah Code Ann. § 76-10-917.

In order to prove a restraint of trade, the State must offer evidence of a conspiracy between the architects and the door hardware manufacturers or distributors. In order for there to be an agreement for purposes of §1 of the Sherman Act (and its Utah analog), there must be a unity of purpose of common design and understanding or a meeting of the minds in an unlawful agreement. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 , 104 S.Ct. 2731, 2742, 81 L.Ed.2d 628 (1984); *Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137 (10th Cir. 1997). There is simply no objective evidence of any conspiracy or unlawful agreement in Mr. Mortenson's affidavit. Without that evidence, the CID is improper.

Paragraph 5 of Mr. Mortenson's affidavit states "I believe that petitioner's architectural firm might be a party to agreements or combinations which have the effect of suppressing price competition in the market for the public bidding of door hardware to be installed in public building projects in Utah. This belief is based on my experience in investigating antitrust violations and the following additional information." That architects "might" be a party to agreements or combinations is not evidence. Mr. Mortenson's "belief" based on his experience, if evidence at all, is subjective, not objective.

The "following additional information" he refers to in his affidavit is a generic discussion of how he perceives architects work with manufacturers and distributors of door hardware as they develop plans and specifications. He discusses what he perceives is the possibility of improper conduct. He cites no specific instance in which the possible improper conduct has occurred. He suggests that if the architect uses the manufacturer or distributor to help him write the door hardware specifications, it opens the arrangement to abuse, but he cites no specific instance where such abuse has occurred. Further, he does not allege that an agreement to restrain trade exists, and omits the possibility that no such abuse occurs.

In paragraph 15 of Mr. Mortenson's affidavit he says that there are many situations where specifications have contained "no substitution" provisions for door hardware which resulted in increased costs to the public agency. Again, he cites no specific instance. The fact, if true, is not evidence of the existence of a conspiracy.

A large part of Mr. Mortenson's affidavit is devoted to a discussion of economic theory as to what might happen if the specification writers (read manufacturers and distributors) were to engage in unlawful conduct, but he does not cite any specific instance where such results have occurred. In addition, that discussion of economic theory contains no evidence of an agreement in restraint of trade.

Mr. Mortenson advances the idea in paragraph 8 of his affidavit that architects on public buildings have an economic incentive for public project costs to escalate because ". . . fees paid to architects for their work on public building projects in Utah are a percentage of the total cost to construct or remodel the building." This is incorrect, at least in the case of contracts entered into by DFCM, the administrative body responsible for overseeing the construction of public buildings. (Affidavit of Myron Richardson to which is attached a form of Agreement with architects used by the State of Utah, R. 44) Architects' fees for the State of Utah's public work, and most, if not all, other public work, are agreed to prior to the architect undertaking the work. Once agreed to, the fees are not affected by the cost of the work, whether the cost is more or less than the amount originally budgeted for the project.

Article 11.1 of the standard form Agreement governs how the State compensates architects. The State sets a budget for a building. Based on the State's budget, it then sets a fee to be paid the architect. The Agreement refers to this as "a lump sum fee." Once that lump sum fee is set, the architect does not get any extra

money, no matter how high the cost of the finished building. The lump sum fee is set before the project documents are prepared and before the door hardware specifications, or any other specifications, are considered.

At oral argument below, the State switched its theory on this point from that expressed by Mr. Mortenson. Faced with the fact that architects are paid a lump sum fee, the State argued that use of consultants relieves architects from the burden of preparing specifications. (R. 84:19)

However, architects on public projects in Utah have a strong incentive to keep costs down. Article 5.2 of the Agreement states that if the lowest bona fide bid by a responsible contractor satisfactory to the State exceeds by more than five percent the total construction cost of the project as set by the State, then the Architect shall, at its sole cost and expense, revise the drawings and specifications so that the total construction cost of the project will not exceed the total construction cost set by the State by more than 5%. Thus, if the use of consultants would increase door hardware costs, architects would be served economically by avoiding them.

Mr. Mortenson's affidavit simply fails to give any objective evidence that Brixen & Christopher, or any other architect, was involved in a conspiracy or unlawful objective. The State refers to a "manufacturer-architect" conspiracy. The evidence does not support such a broad use of the term. In paragraph 25 of his affidavit, Mr. Mortenson describes the alleged "Restriction of Trade". He says that it "appears" that the "agreements" by which architectural firms permit manufacturers' representatives to

write specifications for door hardware to be included in bids for public buildings in Utah are restraining trade by preventing other brands from being qualified to be included in bids by contractors and by preventing other suppliers from competing against the manufacturer's authorized distributors. This statement contains a huge, speculative logic jump. The conclusion is not justified by the "appearance". There is also no statement that anyone has engaged in a conspiracy.

The State makes the curious argument that "the sufficiency of the State's evidence should be evaluated, not its accuracy." Inaccurate information is insufficient. Perhaps more to the point, assumptions are insufficient. Mr. Mortenson's affidavit incorrectly assumes that architects have an incentive to increase prices. It assumes with no evidence that there is a conspiracy between architects and door hardware suppliers.

The difficulty with Mr. Mortensen's affidavit is that it contains a long list of generic assumptions, mainly speculative, subjective assumptions, about the possibility of unlawful activities conducted by a number of unnamed parties. The conclusion he reaches in Paragraph 25 is an amalgam of unsupported, speculative facts without any specificity. In contrast with the *Evans* case, on which the State relies in support of its CID, there are no specific facts to tie Brixen & Christropher to the possible agreements between unnamed persons.

Unlike Mr. Mortenson's affidavit, the affidavit of the investigator in *Evans v. State* contained objective facts of a conspiracy. It stated that there were only two radio stations that ran local advertising in the Uintah Basin. A father owned the station in

Roosevelt and his son worked as general manger of the station in Vernal. The stations had identical prices. The stations offered discounts for merchants who were willing to advertise on the stations in both towns. Father and son joined in common ownership of land and buildings belonging to the two radio stations. Mr. Mortenson's affidavit is devoid of such facts.

On page 11 of his 11 page affidavit, Mr. Mortenson describes "Relevant Information Possessed by Petitioner." Paragraph 26 says that based on a visit to the State Division of Facilities and Construction Management, Mr. Mortenson is aware that Brixen & Christopher performs architectural services on public buildings. This is hardly an indicia of possible culpability. Paragraph 27 says that in June, 1999, Mr. Mortenson sent a questionnaire to a number of architectural firms including Brixen & Christopher, and that Brixen & Christopher did not respond voluntarily. Failure to respond to a voluntary questionnaire is not evidence of a conspiracy.

Neither of those paragraphs suggests that Brixen & Christopher is involved in, or knows anything about, an antitrust violation. The paragraphs give no objective evidence that Brixen & Christopher engaged in any of the activities complained about.

The State also relies upon *State v. Thompson*, 751 P.2d 805 (Utah App. 1988), rev'd on other grounds, 810 P.2d 415 (Utah 1991) to the effect that the bribery of a corporate officer to induce that officer to select one service provider over its competitors can amount to an antitrust violation. The State analogizes that holding to the conduct of architects accepting free services from hardware manufacturers in

creating specifications that will prevent competitors from qualifying for the bid as a group boycott. Of course, the State makes no allegation that Brixen & Christopher (or any other architectural firm) has accepted bribes. There is nothing in the affidavit to show that the architects, individually or collectively, create specifications to stifle competition.

B. The State has failed to marshal the evidence in support of Judge Lewis' ruling.

In evaluating the propriety of a CID, a court must apply the standard of *Evans* to the facts in the case. *Evans* at 183. Judge Lewis did so, and the State now challenges that factual application. However, to successfully challenge a factual finding, appellants must marshal all evidence supporting the finding and then demonstrate that despite the evidence the finding is so lacking in support as to be against the clear weight of the evidence, and, thus, clearly erroneous. *State in the Interest of G.V., et al v. State*, 916 P.2d 918 (Utah App. 1996).

In this case the State has made no effort to marshal the evidence in support of Judge Lewis' decision. This evidence includes the Affidavit of Myron Richardson, in which he provides evidence that architects in Utah do not have any economic incentive to inflate door hardware prices. It also includes the admission against the State's interest that, although Brixen & Christopher is a named target in this investigation, the State has no evidence that Brixen & Christopher has committed any wrongdoing. (R. 84: 13).

C. The State failed to show that Brixen & Christopher possesses information relevant to the State's investigation.

The State's CID was properly dismissed because the State failed to show reasonable cause that any violation of the antitrust laws occurred. It was also properly dismissed because the State failed to show that Brixen & Christopher violated the antitrust laws or possessed information relevant to the State's investigation..

Judge Lewis was troubled by the State's failure to show reasonable cause that Brixen & Christopher had committed an antitrust violation. She recognized the interest of the State in keeping information confidential. She also recognized that "the plaintiffs have an interest, too, in being free from improper notice and orders that to an ordinary citizen are extraordinarily frightening and inappropriate unless they are founded on facts." (R. 84: 16)

The State argues that it need not demonstrate reasonable cause to believe that Brixen & Christopher was violating the law. It cites no authority for its position other than its interpretation of the CID statute. The statue does, however, require that the Attorney General show that the information sought is relevant to the claimed violation. Utah Code Ann. § 76-10-914(7)(b)(ii) When a CID is issued to a target of an investigation requiring it produce its documents (which may be used against it), it logically follows that the statute requires the State to show that there is reasonable cause to believe the target has violated the antitrust laws. The State must show that the information it seeks is relevant to Brixen & Christopher's suspected violation.

In this case the State has made it very clear that Brixen & Christopher is a target of its investigation. (R.5, ¶8) The CID tells Brixen & Christopher that "Any documents or materials produced in response to this Civil Investigative Demand may be used in a civil or criminal proceeding against you or anyone else." (R.5, ¶4) The State here is not seeking someone else's documents which might be in Brixen & Christopher's possession. It seeks Brixen & Christopher's own documents about its own conduct with the purpose of holding Brixen & Christopher liable. (R. 7 and 8)

Judge Lewis prompted the State to provide her with information about the connection between the alleged violation and the information in the possession of Brixen & Christopher. The State was unable to do so. At oral argument, the State merely posited that if an architectural firm uses outside consultants they must use consultants affiliated with manufacturers and distributors and that Brixen & Christopher "does a fair amount of work for the State." (R. 84:24) When asked if there was any documentary evidence to support its allegation, the State responded that it had not provided any, but relied upon Mr. Mortenson's affidavit. (R. 84: 22)

The State admits that it has no evidence that Brixen & Christopher has violated the antitrust laws. Footnote 6 of its brief reads:

> While in this case Brixen & Christopher is suspected of allowing this manufacturer to help write its bid specifications, *the State does not yet have proof of that fact*. This is the type of information sought in the CID issued to Brixen. Judge Lewis expressed her belief that the State's evidence did not show a violation by Brixen. But a showing of misconduct by a CID recipient is not a prerequisite to enforcing a CID.

(emphasis added).

Judge Lewis correctly set aside the Civil Investigative Demand ("CID") issued by the State of Utah against Brixen & Christopher Architects, P.C. because she decided that the State's affidavit before her did not provide sufficient facts or objective evidence of conspiracy or restraint of trade by architects, particularly by Brixen & Christopher.

D. Judge Lewis properly applied the law.

The State implies that Judge Lewis would not allow it to explain at oral argument the reasoning and application of *Evans*. The record belies the implication. Before oral argument, Brixen & Christopher's Motion to Set Aside Civil Investigate Demand had been fully briefed, with both sides explaining their views of *Evans*. Judge Lewis expressed that she was already familiar with the case law, and asked the State to provide a factual nexus to the principles of *Evans*. She also allowed the State to have the last word and speak to any issues of its choice. The State asked if it could explain the *Evans* decision and its implications. Judge Lewis agreed. The State proceeded to explain *Evans* fully. (R. 84: 29 - 31) Judge Lewis understood and applied *Evans*; she merely decided that the material presented to her did not satisfy the *Evans* standard.

A fair reading of the transcript of the hearing in this case leads to the conclusion that Judge Lewis was concerned about two things. First, the State had named Brixen & Christopher as a target of its antitrust investigation when in fact, as the State admitted at oral argument, Brixen & Christopher is not a target. (R. 84: 9)

Second, Mr. Mortenson's affidavit lacked sufficient factual specificity to reasonably conclude that there had been an antitrust violation. Under *Evans*, Judge Lewis' decision is entitled to a measure of discretion, and should be upheld.

CONCLUSION

In paragraph 4 of Mr. Mortenson's affidavit he advises he has talked to over 20 individuals familiar with the door hardware business. One would think he could come up with some specific fact to support the assumptions he has made in his affidavit. The affidavit is replete with words such as "appears", and "if" such an event occurred, or that a distributor or manufacturer "may" offer services.

The speculative script that the State draws, in essence is this:

> Architects prepare plans and specifications for public buildings. In order to do so, they obtain information from various suppliers of products to be used in a building, including door hardware. It is to the architect's advantage to increase the cost of the building, because by doing so he increases his fee. Door hardware manufacturers take advantage of this fact by writing the specifications for the architect, free of charge, inserting the manufacturers' own product to the exclusion of others, thus reducing competition.

The difficulty is that this entire scenario is speculation. There are no instances to justify the conclusion that architects succumb to the blandishments of the door hardware manufacturers and distributors. In fact, the so-called motivation for architects to do so is wrong; at least in the State of Utah contracts, and in most others, the change in the cost of a building from the budget does not result in an adjustment of the fee.

It is said that the threshold necessary to find "reasonable cause" under the Civil Investigative Demand statute is a low one. We submit that if the basis for the State's issuance of a CID in this case is upheld, the standard is non-existent. The CID is particularly offensive when it describes Brixen & Christopher as a "target" of the investigation, warning that material produced may be "used in a civil or criminal proceeding against you . . .", a kind of civil Miranda warning. The issuance of this CID is an improper intrusion on Brixen & Christopher and should be set aside.

Dated this 23RD day of October, 2000

MOYLE & DRAPER, P.C.

By: _____
Hardin A. Whitney

PRINCE, YEATES & GELDZAHLER

By _____
Robert G. Wing
Attorneys for Petitioner and Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2000, I caused the original and eight true and correct copies of the foregoing Brief of Appellee to be filed with the Utah Court of Appeals and two copies to be hand-delivered to the following:

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G:\RGW\Brixen & Christopher\original appeal brief

Addendum A

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IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

BRIXEN & CHRISTOPHER ARCHITECTS, P.C. a Utah Professional Corporation Petitioner, **vs.** STATE OF UTAH, Respondent.	**AFFIDAVIT OF L. DEL MORTENSEN** Case No. 00-0900651 Judge Leslie A. Lewis

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

L. DEL MORTENSEN, being first duly sworn, deposes on his oath and states:

Affiant

1. I am a Special Agent and antitrust investigator for the Utah Attorney General's Office. I have investigated business or white collar crime for over 24 years. I have been assigned specifically to investigate antitrust violations for the past 1½ years. During those 1½ years, I have participated in the investigation of several antitrust violations. I have received specialized training in the investigation of antitrust violations. I am a certified peace officer for the State of Utah and currently hold the rank of Lieutenant.

2. I am the investigator assigned to the investigation at issue in this matter and have knowledge of the facts and circumstances leading to the issuance of the civil investigative demands in this matter.

Background of this Investigation

3. This investigation began in September 1998 and initially revolved around limits placed on door hardware that could be bid on a building project for a school district in Southern Utah. Since that time, the investigation has expanded to include bids for publicly-funded construction projects around the state.

4. During this investigation, I have interviewed over twenty individuals familiar with the sale of door hardware via bidding for installation in public buildings. The individuals interviewed include representatives of a major manufacturer of door hardware, distributors of door hardware, school district officials, architects, and the Utah Division

of Facilities and Construction Management (DFCM). In addition, I have reviewed documents received from a Utah college, school districts, and DFCM as well as documents received from several Salt Lake architectural firms pursuant to Civil Investigative Demands issued to the architectural firms.

5. I believe that petitioner's architectural firm might be a party to agreements or combinations which have the effect of suppressing price competition in the market for the public bidding of door hardware to be installed in public building projects in Utah. This belief is based on my experience in investigating antitrust violations and the following additional information:

Role of Architects in Bids for Construction of Public Buildings

6. School districts and other owners of public buildings generally select an architectural firm to design the building to be built. Among other tasks, the architect is responsible for identifying the door hardware needed for the building, such as door closers, exit devices (crash bars), and locking devices. The architect is paid to draft specifications to be included in the construction bid for the public building. The goal of having specifications drafted and the bidding process is to obtain as much competition as possible for products meeting the specifications. The competition is designed to ensure fairness and low price for the public agency.

7. The owner of the public building relies on the architect to a) have the expertise to draft

door hardware specifications that will meet the needs of the building owner, b) be completely objective in the drafting of specifications so no particular manufacturer or distributor will be favored without a justified reason for the preference, c) not have improper or undisclosed alliances with interested manufacturers or distributors, and d) draft specifications that will result in as much competition as possible for the purchase of door hardware.

8. It is my understanding that the fees paid to architects for their work on public building projects in Utah are a percentage of the total cost to construct or remodel the building. Consequently, the higher the cost of the building, the higher the fee to the architect. Conversely, if an architect, through its effort, reduces the cost of some components of the building, the architect's fees will be lower.

9. In some cases, a building owner may request a certain brand of door hardware because that brand is already in use in other buildings owned by the entity. However, in many cases, the public agency does not request that the architect limit the door hardware specifications to certain brands. In these cases, the building owner relies on the expertise of the architect to draft specifications that will deliver products that meet the needs of the agency, at the lowest possible prices.

Spec-Writing Consultants

10. When the architect is engaged by the public agency to create construction plans and door

hardware specifications, the architect's fee includes compensation for time to be spent by the architect to draft door hardware specifications.

11. Commercial sources, such as "Master Spec" computerized specifications, are available to architects as they draft specifications for door hardware. In some cases, however, the building owner may have needs that are not easily adapted from the commercial sources, or the architect may not feel that she has the expertise (or does not want to spend the time) to personalize the specifications for the public agency.

12. In Utah, some architects write their own door hardware specifications. However, a large portion, and perhaps a majority, of architects for public buildings in Utah engage the services of outside consultants for assistance in drafting these specifications. The complexity of door hardware specifications encourages architects to use outside consultants.

13. There are no independent door hardware specification writers in Utah. All specification writers are paid either by manufacturers or by distributors of door hardware. For example, one of the largest manufacturers of door hardware in the country has engaged two persons in Utah whose sole task is to assist architects in writing door hardware specifications. Thus, when an outside specification writer is used, that specification writer is always affiliated with either a manufacturer or a distributor seeking to sell certain brands of door hardware.

14. As a result, if the affiliated "spec writer" has drafted door hardware specifications that favor the brand sold by that manufacturer or distributor, it is unlikely that the architect will change the specifications and is even more unlikely that the building owner will detect the biased specifications. This result is made more likely by the general practice of architects not disclosing to building owners when the architect has engaged the services of outside spec writers.

15. My investigation has uncovered many public building bids where the door hardware specifications are written without the option for substitution ("no sub"), so that only certain products will qualify for the bid. In some of those cases, the building owner has requested that the limitation be included. However, this does not explain all of the spec limitations. The investigation conducted to date indicates that a substantial number of public building projects have included door hardware specifications which a) limited the brands which would qualify under the bid, b) were not requested by the building owner, and c) resulted in the public agency paying higher prices than would have been the case otherwise.

16. While these brand-specific specifications may include the phrase "or equal," other brands are at a distinct disadvantage in getting their products approved for the bid. Even if another brand is of equivalent or superior quality, the manufacturer or distributor of that brand must take the time and effort to prove, to the satisfaction of the architect, that the

product is of equivalent quality. This requires effort and expense not required of the brand which already is specified in the specifications. Finally, in some cases, the space of time between the issuance of a bid and the time when bid responses are due does not allow an "or equal" brand to get its product qualified and prepare a bid. Thus, the "or equal" designation puts any competing brands at a significant disadvantage in competing for a bid whose specifications already identify only one brand.

Manufacturer and Distributor Involvement in Specification Writing

17. A large manufacturer of popular door hardware appears to have created a sophisticated system for increasing the prices being paid by public agencies and for making it extremely difficult for other brands to be included in bids for public buildings. This manufacturer provides door hardware to its three Utah distributors according to a variable wholesale price which is set at the discretion of the manufacturer. If the door hardware is to be installed in a project for which bids have been requested, the three distributors can all buy the products from the manufacturer at that same wholesale price. If those bid specifications are limited so that only the products of that manufacturer qualify, the distributors receive no discount, and may purchase the door hardware at that wholesale price. If, however, the bid specifications are written in a way that more than one brand can qualify to provide door hardware, either by the use of performance specifications or because more than one brand is listed, the manufacturer will grant to its distributors

significant discounts from that wholesale price. This discount permits the distributors to offer the door hardware to contractors bidding on Utah public buildings at a price significantly below the normal wholesale price. The discount by the manufacturer to the distributors may be 30-40% below the regular wholesale price. The manufacturer's wholesale discounts result in a lower price for the public agency.

18. Competing brands are significantly hampered in their ability to compete for door hardware bids. Indeed, if the door hardware specifications are limited to one brand (no-sub), competitors cannot even qualify to bid.

19. In addition to the manufacturer, Utah distributors of that brand also may offer spec writing services to architects. Those spec writing services also are offered to architects for free. The distributor covers the cost of writing door hardware specifications not only from the increased chances that his product will be chosen for the bid, but also by compensation from the manufacturer. This manufacturer has a policy of paying a bonus to a distributor that a) writes a specification that permits only that brand to qualify and b) actually wins the bid to supply that product. This bonus can be used to offset the costs of offering spec writing services and to reward the distributor for getting that product placed. The manufacturer can afford to pay bonuses in cases such as this because its wholesale price is higher than it would be if other brands were permitted to be bid.

20. The bonus payments the distributor receives from the manufacturer are an incentive for

the distributor's spec writers to write specifications favorable to this manufacturer's products.

21. From my review of door hardware specifications for public projects, it appears that a clear majority of no-substitution specifications identify products of this manufacturer. No-substitution specifications for other brands are less common, and to my knowledge occur only when the building owner requests the limitation.

22. A bid containing door hardware specifications limited to only one brand still will result in a certain level of limited competition. If the manufacturer succeeds in getting an architect to include specifications limited to its brand, there still are three distributors in Utah of that brand. Those distributors are competing to be selected to provide the door hardware to contractors building the new edifice. However, that competition only limits the amount of the markup being charged by the distributors. It does not provide competition on the wholesale price. Each of those distributors is paying the same "regular" wholesale price for the product. On the other hand, if other brands are included in the specifications, the public agency will get competition for the wholesale price as well as the competition among distributors. A brand-limited specification provides competition only for one level of the cost of door hardware and excludes competition on other levels.

23. Because this dominant manufacturer's efforts to capture the door hardware market are focused on architectural firms and, to a lesser extent, on building maintenance

representatives, rather than on distributors, the distributors have less ability to deliver low bid prices. By using strategies which result in architects preparing increasingly restrictive bid specifications favoring its products, the manufacturer is ensuring its products will be sold, without discounts, regardless of which distributor wins the bid.

24. In addition to brand-limited specifications, spec writers from this manufacturer and its distributors also frequently include requirements that the supplier of door hardware be a "factory direct" supplier. While this provision is written ostensibly to exclude "fly-by-night" contractors and suppliers, it actually serves to protect the high margins of the authorized distributors of this manufacturer. This requirement prevents other reputable contractors from obtaining the door hardware from other sources at prices below those of the authorized distributors.

Restriction of Trade

25. It appears that the agreements by which architectural firms permit manufacturers' representatives to write specifications for door hardware to be included in bids for public buildings in Utah are restraining trade by preventing other brands from being qualified to be included in bids by contractors and by preventing other suppliers from competing against the manufacturer's authorized distributors. These restrictions result in public agencies paying higher prices for door hardware components of public buildings than would be the case in the absence of these restraints.

Relevant Information Possessed by Petitioner

26. Based on a visit to DFCM, I am aware that Petitioner, Brixen & Christopher, does perform architectural services on public buildings.

27. In June 1999, I sent a questionnaire to a number of architectural firms in the Salt Lake area, including Petitioner, seeking information to assist us in this investigation. Petitioner failed to respond to the questionnaire or provide any information voluntarily.

Further, Affiant saith not.

NOTARY PUBLIC
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Salt Lake City, Utah 84114-0872
My Commission Expires
January 9, 2003
STATE OF UTAH

L. DEL MORTENSEN

SUBSCRIBED AND SWORN TO before me this 22nd day of February, 2000.

NOTARY PUBLIC